

(1)

T H E

CASE of Peter Warburton, Esq;

Against his Sisters *Alice* and *Hester* ; and his Brother
Dr. *John Warburton*, and *Matthew*, *Henry*, and *Mary* his Wife.

Alice and *Hester Warburton*, Appellants, }
Peter Warburton, Respondent, ——— } in the *First Appeal*.

The said *Peter Warburton*, Esq; Appellant, }
The said *Alice* and *Hester Warburton*, and }
Dr. *John Warburton* their Younger Bro- } in the *Second Appeal*.
ther, *Matthew*, *Henry*, and *Mary* his }
Wife, Respondents, ————— }

The Complaints in the *Appeal* of *Alice*
and *Hester*, are, —————

- 1st. That They being Defendants in *Chancery*, at the Suit of *Peter*, and Executrixes, were denied their Costs of Suit.
- 2^{dly}. That they are Decreed to Distribute and Pay to the said *Peter* a Double Share of the Surplus of their Father *Robert Warburton*'s Personal Estate.

The Complaints in the *Appeal* of *Peter*, are, <

- 1st. That he was denied his Costs of Suit.
- 2^{dly}. That 238 l. 11 s. 6 d. (Remainder of the Brother *Thomas*'s Portion,) together with 84 l. 2 s. Interest thereof, is Decreed to be raised out of the Trust-Estate, although he Died Intestate in the Life of his Father.

The General
State of the
Demands of
Both Sides.

By Lease and
Release, dated
14th, 15th of
Novemb. 1690.
And by Will,
dated 19th of
May, 1691.

THEIR Father, *Robert Warburton*, Esq; Son and Heir of *Peter Warburton* (sometime one of the Judges of the *Common Pleas*) being seised of Fee-simple Lands of 275 l. per Annum, Lease-hold Lands of 140 l. per Annum, all lying in *Cheshire*; and of Fee-simple Lands in *Worcestershire*, (since sold, by virtue of the Decree in this Cause, for 2000 l.)

Conveys all his said Estate to the Defendant *Thomas Hand*, (and another who did not act,) and their Heirs, to the Use (after his Death) of themselves for Ninety nine Years, with a Power of Revocation; Remainder to his Eldest Son the Appellant *Peter* for his Life, with Power, when seised of the Freehold in Possession, to make a Jointure to any Wife, not exceeding 200 l. per Annum, Remainder to his First and all other Sons in Taile; like Remainder to his Second Son *Thomas* (since dead without Issue) and his Sons in Taile; Remainder to his Third Son *John Warburton* (now Doctor of Physick) for his Life, and to his first and all other Sons in Taile Male; Remainder to the Appellants *Alice* and *Hester*, and the Heirs of their Bodies; Remainder to his own Right Heirs, which is the Appellant *Peter*.

The Trusts of the Term for Ninety nine Years, are, out of Rents and Profits, to raise 1100 l. in the first place for the Portion of the Respondent *Alice*; 1000 l. in the next place for the Portion of the Respondent *Hester*; 300 l. in the next place for the Portion of *Thomas*; and 700 l. in the next place for the Portion of Defendant Dr. *John Warburton*, with Interest at 6 l. per Cent. till Payment: And by the Will he also appoints 400 l. to be raised by the Trustees, and paid to his Executrixes; and gives the Respondent *Alice* several Household-Goods by name, and also all such Summ and Sums of Money, Bonds and Personal Estate whatsoever she then had in her hands and possession, or that were any ways due unto her from any Person or Persons whomsoever, to and for the sole and only Use and Benefit of the said *Alice*: And by his Settlement gives Appellant *Peter* but 40 l. per Annum for Maintenance, till all the Trusts are discharged: And by his Will gives him an Old Horse, which was sold for 02 l. 15 s. 00 d. and makes *Alice* and *Hester* Executrixes, and gives them the Residue and Surplus of his Personal Estate, and appoints them to dispose of the same (as also the said 400 l. that was to be raised out of the Trust Estate) to the Use of themselves, their Brothers and Sister, or to such of them and in such Proportions as they shall judge most fit and convenient, according to the Need and Necessities of their said Brothers and Sister respectively.

14. Apr. 1696.

The Father died at *Hefferston Grange*, his House in *Cheshire*.

Michaelmas,
1696.

The Appellant *Peter* filed his Bill against the Respondents *Alice* and *Hester*, and against Dr. *John Warburton*, and *Hand* the Trustee, and Mr. *Henry*, and his Wife, who was another Daughter; thereby Praying,

1st. That

1st. That the said Portions might be raised by sale of a competent part of the Estate, for the Trust Term of Ninety nine Years ; and that the whole Burthen might not lie upon his Estate for Life.

2^{dly}. That the said *Peter* being under the greatest Need and Necessity, might have a reasonable Share of the Personal Estate, and of the said 400 *l*.

3^{dly}. That all the Deeds and Evidences of the Estate might be produced and preserved.

4^{thly}. That the Plaintiff might have 400 *l*. paid him out of the Personal Estate, according to his Father's Appointment and Promise, towards discharging Debts which the Plaintiff still owes and contracted in endeavouring to get Matches by his Father's Order.

5^{thly}. For a Discovery of the Particulars and Values of the Personal Estate, and also of such Parts thereof as the said *Alice* and *Hester* claimed by Gift to their own Use.

6^{thly}. That the Plaintiff might be paid the Summ of 30 *l*. Arrear at his Father's Death, for his Maintenance.

The said *Alice* and *Hester*, by their Answer and Defence, contested all these Demands.

First Hearing, 9. July, 1697. The Cause came to be Heard before the Lord Chancellor *Somers*, who made no Final Decree, but directed that the Particulars and Values of the Personal Estate, and the Claims of all Parties, and several other Matters to be Stated to the Court for the better Determination of the Matters in Question ; but ordered the Defendants to bring all the Deeds and Writings before the Master.

First Report, 11. Jan. 1698. The Master made his Report thereupon.

Second Hearing, 26. May, 1699. Second Hearing before the Lord Chancellor *Somers*, who then settled several Matters ; But the Values of the Real and Personal Estate being then not finally settled, but several Matters relating thereunto being referred back to the Master : The main Points touching the Sale of the Trust Estate, and whether the Plaintiff *Peter* should have any part of the Personal Estate, were reserved till the Final Account should be taken : But then Ordered the 30 *l*. Arrears of Maintenance to be paid ; And Ordered several things to be brought into the Personal Estate, which *Alice* and *Hester* claimed to be given to them ; And also, That 100 *l*. and Interest, for four Years, which the Father promised to pay, towards his Son *Peter*'s proper Debts, to be paid out of the Father's Personal Estate.

Second Report, 14. Feb. 1699. The Master made his Second Report.

Third Hearing, 17. Octob. and 18. Novemb. 1700. Upon Hearing before the now Lord Keeper of the special Matters referred, and also Examinations both sides to the Last Report ; His Lordship Declared, That considering the Plaintiff *Peter* is Heir of the Family, and was Bred up to the Law, and looking upon him as a Person necessitous, he ought to have a double Share of the Surplus of the Personal Estate, and of the 400 *l*. which was to be raised out of the Trust Estate, and Decreed the same accordingly, and the Master to settle the same and carry on the Account of the Personal Estate.

And also Decreed the Trustees to sell the Trust Term of 99 Years of and in so much of the Trust Estate as would pay the Portions unpaid and the 400 *l*. And the Master to allow a Purchaser for that.

11. Feb. 1700. The Defendants Petitioned for a Re-hearing, both as to the Sale, and Distribution of the Personal Estate.

Rehearing, the 13. May, 1701. Upon which Rehearing, His Lordship continued in the same Opinion, and gave the Defendants no Relief, save only, That a proportionable part of the Lease-hold Estate within the Trust should be Sold, as well as of the Free-hold Estate.

Note. That Petition and Re-hearing delayed the Sale ; And a Purchaser having agreed to give 2000 *l*. for the *Worcestershire* Estate, the Defendants *Alice*, *Hester*, and Dr. *John*, by Motions, References, and Petitions, delayed the Compleating of that Sale for a Year and half, viz. from October 1700. till about Lady-day 1702. And then at last they submitted to join in that Sale, whereby they were fully paid their Portions :

Note. So that all that remained to be raised out of the Trust Estate was, 238 *l*. 11 *s*. 6 *d*. due for *Thomas*'s Portion and Interest thereof, and the 400 *l*. to be raised out of the Land, (both which Summs are by the Second Decree thrown into, and make about half of the Personal Estate of the Father,) and also the Costs of *Thomas* and the Trustee ; towards Discharge whereof, the Plaintiff had procured a Purchaser for other part of the Trust Estate, at the Price of 700 *l*. But after several Motions, Petitions, and Exceptions, whereby the Defendants greatly delayed the Plaintiff *Peter*.

16. July, 1702. It appearing that upon the Final Account of the Personal Estate, That the Plaintiff's Double Share being two sixth parts of what remained in the Hands of the said Executrixes *Alice* and *Hester*, amounted to 144 *l*. 17 *s*. 7 *d*. which they were Ordered to pay to the said *Peter* before the First Seal after Michaelmas last ; And it is further Ordered, That the residue of the Personal Estate being about 1500 *l*. due by Bond and otherwise, be divided according to the Decree in Sixths, of which the Plaintiff *Peter* to have Two Shares.

And as to the Real Estate, the Account hereof being finally closed, upon which it appeared, That there rested 41 *l*. in the Hands of the Trustee *Hand* ; And that about 900 *l*. Rents then remained in the Hands of the Tenants of the *Cheshire* Estate, subject to Tenants Deduction, and all further Arrears growing due since, and also 56 *l*. and upwards (which now appears to be 105 *l*. in the Hands of the *Worcestershire* Receiver, his Lordship Declared, That there ought to be no further Sale made ; but that the 700 *l*. yet unrais'd, should be satisfied out of the said Arrears, (if sufficient) or else out of the future Rents ; And that *Hand* do get in the said Arrears, and thereof pay the said 700 *l*. and his own Costs, and the Overplus (if any) to the Plaintiff *Peter*.

And further Ordered, That the said Trustees do surrender the Trust Term of Ninety nine Years to the Plaintiff *Peter* ; And that he be let into the Possession of the Estate, and receive the Rents due at Michaelmas then next, (and now past.)

And as for the Executrixes Costs then prayed, his Lordship thought not fit to make any Order therein.

13. October, 1702. And the Defendants the Executrixes pretending they wanted a little further Time to raise and pay the said 144 *l*. 17 *s*. 7 *d*. (being the Plaintiff *Peter*'s Share of what they had in their hands of the Personal Estate) a Month's further time was granted them.

7. November, 1702. The Plaintiff *Peter*, and the Defendants *Hester* and *Alice*, (Each of them Petitioning for Costs of this Suit) his Lordship Declared, That neither of the said Parties ought to have their Costs, and dismissed both their Petitions.

7. November, 1702. The Executrixes desired further Time to pay the said 144 *l*. 17 *s*. 7 *d*. And it is Order'd that the said Executrixes shall have a Month's time from thence, to pay the same (upon their Entering their Appearances upon

upon Attachments, which they did do.) And it is further Order'd, by Consent, That the said Executrixes do pay the Plaintiff *Peter* his Double Share of what hath been receiv'd since the Master's Report, touching the Personal Estate, to be ascertain'd by the Defendant *Hester's* Oath.

But it seems the said *Alice* and *Hester* got those further times for Payment of the said 144 l. 17 s. 7 d. not with a real Intention to pay the same; but to keep themselves from being Committed for not Payment, till they could prepare an Appeal.

And so likewise the Trustee *Hand* (who has all along been their great Friend, and a very partial Trustee, all along acting in their Interest) has obtain'd an Order to suspend his Delivering up Possession to the said *Peter*, and letting him into the Receipt of the *Michaelmas* Rents, till it appears whether the Money in his and the Arrears in the Tenants Hands are sufficient to answer his Costs, as well as the 700 l. unpaid. And though he was long press'd to have his Bill of Costs brought in to be Taxed, he delayed it till the last Term; when further to oppress the said *Peter*, he brought in a Bill of Costs, amounting to above 400 l. although, in truth, he never was at any Costs; but the Doctor and his Sisters bore all the Charge, except 40 l. that he paid out of the Money received by him out of the Trust Estate. So that they are Hedging in their Costs that way, if they fail of Success in their Appeal.

1st. As to the Matter of Costs, whether the said *Peter* shall have his Costs, against the said *Alice*, and *Hester*, and Dr. *John*, or shall pay Costs to the said *Alice* and *Hester*?

Peter humbly insists, he is well intitled to his Costs of this Suit.

1st. He had just Cause of Suit, and has prevailed in all the Six Demands in his Bill, which are before particularly mention'd; save only (in Part) as to the Payment of his own Debts, which was for the Reason herein after mention'd.

And it is natural Justice, That the Costs should follow the Right which is relieved: And in the *Exchequer* Court, it is the Course of that Court for the Plaintiff in all Cases to have his Costs, where he has a Decree, without any particular Order for them.

2^{dly}. Here has been an Obstinate Unnatural Defence for Six Years by the Defendants, in opposing a Sale to raise the Trust Money, (which is now acquiesced in, and not Appealed against) and in all other Matters of the Cause: Whereas, if they had fairly submitted themselves, by Answer to the Judgment of the Court, the Cause might have been determined by Bill and Answer in two Terms, and for little Expence. And this was not for their Indemnity, but to support themselves in their own Unjust Advantages which they had got from the Father, to the Disinheritance of the Heir: And they have been now fencing above Two Years after the Lord-Keeper had determined the Right against them.

3^{ly}. The Plaintiff *Peter* has all these Six Years had nothing but his bare 40 l. a Year to maintain himself and carry on this Suit: And the Defendants have had the Rents of the whole Estate to defend the Suit; And *Alice*, *Hester*, and Dr. *John*, and Mr. *Hand* (their Trustee) have had but one Solicitor for them all jointly

4^{ly}. If the Defendants had immediately on Filing the Bill, submitted to the Raising of the Portions by a Sale, which at last they have submitted to, it would have sav'd the Plaintiff *Peter* at least 783 l. 13 s. which has been paid out of *Peter's* Rents, for Interest of the Portions incurred in that time: And 800 l. of the Principal Money which has been likewise paid out of the Rents; And also the Remaining 700 l. which is now to be further paid out of his Rents in the Tenants Hands; So that by this delay in not selling sooner, the Plaintiff suffers at least 2283 l. 13 s. And the Defendants (who for the sake of their Estates in Remainder if *Peter* dies unmarried, have occasion'd this delay) have saved the selling of 1500 Pounds worth of the Estate.

5^{ly}. The Plaintiff could not raise the Portions by Marriage, because he could make no Jointure till the Trust Term for Ninety nine Years determined, which could not be till the Money paid, and Six Years delay by those in Remainder to keep him from Marriage, makes their Remainders the more valuable.

6^{ly}. All that the Plaintiff *Peter* has gained by this Expensive Suit, is only a Double Share of the Personal Estate, which (or the greatest part) now is to be paid him out of his own Rents that lie in the Tenants Hands, and does not amount to above 600 l. in the whole.

And his own Charges in this Suit are near 400 l. for which he stands Engaged to his Solicitor and others; And to pay the Defendants Costs for all their Vexation will sink him, for if the Executrixes have Costs, they must be against his Person, (they can't be out of the Estate,) so that he must Starve, having but 40 l. per Annum, whereas they have all good Portions which they have constantly had full Interest for, besides the Remainder of his own Debts of about 400 l. which remain unpaid; And will Encourage them to keep him in Chancery Six Years longer, if they must be rewarded with Costs for the Vexation past and to come.

As to the Plaintiff *Peter's* having a Double Share of the Personal Estate, there is great Justice in it, because He has the most Need and Necessities, and Difficulties upon him of all the Children.

And the Lord Chancellor *Somers* directed the matter of the Personal Estate, to be first Enquired into and Stated.

Ability of the
other Chil-
dren.

Whereby it appears, That *Alice* has 1100 l. Portion; And under the general Words of the Will, of all Money, Debts, and all other things given to her, is allowed 400 l. more at Interest given her some Years before the Father's Death, 50 l. in Gold, 50 l. in Silver, and other things worth near 20 l. *Hester* has 1000 l. Portion, and several things allowed her as given: And Dr. *John* has 700 l. and his Profession in Physick, and all Charges of his Education and Degree; And all Three of them have had their Interest of 6 l. per Cent. punctually paid them by the Trustee, and sometimes before it was due.

Necessities of
Peter.

On the Contrary, *Peter* the Eldest Son and Heir was to have but 40 l. per Annum till all the Trusts are discharged; And that but ill paid, seldom without an Order of Court for it, and has not had a Farthing since Lady-day last, and is in debt near 400 l. for his Charges of this Suit; Was placed at *Lincolns-Inn*, where he is now a Benchet, and had but 60 l. per Annum Allowance from his Father in his Life-time; And was made to give his Father Bond to repay it, and to repay him the Money, which bought him half a Chamber at *Lincolns-Inn*. Though it is true, some Years after, and a little before he died, the Father (with great difficulty) was prevailed with to cancell those Bonds; was pressed by his Father for several Years to get a Wife with 4000 l. And all that he would settle was but 150 l. per Annum, which was the only Occasion of his Debts of 400 l. and is so proved: And the Father some Months before his Death was made so sensible of it by Mr. *Cholmondeley* of *Vale-Royal* (who is a Witness in this Cause) and others, that he promised to pay 400 l. to discharge those Debts, and called in Money to return to *London* for that purpose, but dyed before it was returned; And thereupon *Alice* and *Hester* refused to pay it; And the Lord Chancellor *Somers* conceiving it to be but a good purpose and Intention of the Father, and not a Right recoverable by the Plaintiff, did not relieve him, save as to 100 l. and Interest thereof before said for Four Years

Years only, for which there was a plain Letter under his Father's Hand; and so severe were the Younger Brother and Sisters, that there being 30 l. of the Allowance behind at the Father's Death in April 1696. they would not pay that, till the Cause in Chancery Heard, and an Order for it: And (after all) Peter is but Tenant for Life, and cannot make a Jointure exceeding 200 l. per Annum.

Moreover, the Defendants *Alice* and *Hester* have created great Expence, in being backward and dilatory in discovering the Particulars and Values of the Personal Estate, and also the Particulars of what was given them; and particularly claimed, as part of the Personal Estate, the Judge's Picture, not worth Twenty Shilling, and put the Plaintiff to prove it given by an Aunt, as an Heir-Loom. They claimed and pull'd down the Grates in the Chimneys, and a great Cooler, and other Brewing Vessels and Copper which were fix'd, and put the Plaintiff to prove they belonged to the Free-hold: And these mighty Points were stated especially for the Lord Somers's Opinion, and by him Decreed to Plaintiff, as also the 30 l. Arrear of his Maintenance at his Father's Death.

Objec. The said *Alice* and *Hester*, by their Answer, insist positively, That they have an Arbitrary Power to dispose of the Personal Estate as they please, and that the Chancery ought not to interpose, and that the Plaintiff *Peter* was not intended and should not have any Part.

Answ. That unnatural, unjust and ill Use of their Discretionary Power, and thereby defeating the true Intention of the Testator (which was, That the most Necessitous ought to be regarded) gave the Chancery a just Reason to interpose and correct the ill Conscience of an Executor, as they have done in such like and other Cases.

But, Note, The said *Alice* and *Hester* are barred from Appealing in this Point, by their own Consent, in the Order of the 7th of November, 1702. whereby they ask further Time to pay the 144 l. 17s. 7d. and Consent to pay *Peter's* Proportion of what they have further receiv'd.

3. As to the Point, Whether the 238 l. Remain'd of *Thomas's* Portion ought to be rais'd;
It is conceiv'd, it ought to sink into the Estate:

Because it was created by the Father in a Voluntary Family-Settlement, with Power of Revocation: And the Son dying a Batchelour and Intestate about three Years before his Father, the Chancery will never raise a Child's Portion out of a Trust upon Land, when there is no occasion for it; especially here, when the Father, as next of Kin, was intituled to it (by Right of Administration) if it still subsisted: And he never apprehended he had any Right to it, because he never took Administration, nor said or did any thing whereby it might appear that he claimed it: And he had a Power to revoke it; and doubtless had he not conceiv'd it lapsed, would have done so. And it is very odd, that his whole Estate should owe him this Summ of Money, which he intended only for a Child, and not for himself.

Wherefore the said PETER WARBURTON humbly prays Relief on his Appeal, to be as to the said 238 Pounds, and Interest, That it may not be Raised, and that he may have his Costs of this Suit:

And that the Appeal of the said *Alice* and *Hester* may be Dismissed with Costs.

Alice and *Hester* Warburton, Appel'
Peter Warburton, Elq; Respond'
THE
Respondent's CASE.